FILED
NOV 26 1976

In the Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1473 and 75-1705

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,
Petitioners (and Cross-Respondents),

v.

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency,
Respondent (and Cross-Petitioner).

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS (AND CROSS-RESPONDENTS)

ROBERT C. BARNARD
DOUGLAS E. KLIEVER
CHARLES F. LETTOW
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorneys for Petitioners (and Cross-Respondents)

OF COUNSEL:

CLEARY, GOTTLIEB, STEEN & HAMILTON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

NOVEMBER 26, 1976

INDEX

Page

I. EPA Would Abrogate Congress' Purpose In Providing Separately In The Act For Promulgation Of New Source Standards By Regulation And For Issuance Of Permits For New Sources 1

II. Except In Extraordinary Cases, Statutes Providing For Agency Rules Of General Applicability Are Construed To Include Use Of "Safety Valve" Procedures To Provide Relief Where Special Circumstances Are Shown 6

III. Congress Did Not Provide That New Source Standards Must Always Be Applied Notwithstanding The Existence Of Special Circumstances 7

IV. The Provisions Of Section 402(k) Explicitly Provide For Permit Conditions Which Are Different From EPA's New Source Standards 9

Conclusion 11

CITATIONS

Cases:

CPC International Inc. v. Train, — —F.2d— —, 9 E.R.C. 1301 (8th Cir. 1976) *("CPC II")* 5

Federal Power Commission v. Texaco, Inc., 377 U.S. 33 (1964) 7

International Harvester Co. v. Ruckelshaus, 155 U.S. App. D.C. 411, 478 F.2d 615 (1973) 6

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 7

Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 537 F.2d 642 (2d Cir. 1976) 2, 3, 5

	Page
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	7
Portland Cement Ass'n v. Ruckelshaus, 158 U.S. App. D.C. 308, 486 F.2d 375 (1973), *cert. denied*, 417 U.S. 921 (1974)	6
United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972)	6, 7
United States v. Storer Broadcasting Co., 351 U.S. 192 (1956)	7
WAIT Radio v. Federal Communications Commission, 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969)	6, 7

STATUTES:

Federal Water Pollution Control Act	
§ 301, 33 U.S.C. § 1311	2, 8
§ 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A)	4
§ 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A)	4
§ 301(c), 33 U.S.C. § 1311(c)	4
§ 302, 33 U.S.C. § 1312	2, 5
§ 306, 33 U.S.C. § 1316	1, 2, 4, 8, 9
§ 306(a)(1), 33 U.S.C. § 1316(a)(1)	4, 5, 10
§ 306(a)(2), 33 U.S.C. § 1316(a)(2)	4
§ 306(d), 33 U.S.C. § 1316(d)	10
§ 307, 33 U.S.C. § 1317	2
§ 309, 33 U.S.C. § 1319	2
§ 402, 33 U.S.C. § 1342	2, 4, 10
§ 402(a), 33 U.S.C. § 1342(a)	2
§ 402(a)(1), 33 U.S.C. § 1342(a)(1)	2
§ 402(b), 33 U.S.C. § 1342(b)	2
§ 402(b)(1)(A), 33 U.S.C. § 1342(b)(1)(A)	2
§ 402(b)(1)(B), 33 U.S.C. § 1342(b)(1)(B)	10
§ 402(k), 33 U.S.C. § 1342(k)	2, 9, 10, 11

	Page
§ 403, 33 U.S.C. § 1343	2
§ 505, 33 U.S.C. § 1365	2
§ 510, 33 U.S.C. § 1370	5
National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*	10

MISCELLANEOUS:

Address by Deputy Administrator John R. Quarles, *To Grow Or Not To Grow—That Is Not The Question*, Fifth Annual International Pollution Engineering Congress, November 10, 1976	5
Congressional Research Service of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972* (1973)	8
H.R. 11896, 92d Cong., 2d Sess. (1972)	8
S. Rep. No. 92-1236, 92d Cong., 2d Sess. (1972)	8

In the Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1473 and 75-1705

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,
Petitioners (and Cross-Respondents),

v.

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency,
Respondent (and Cross-Petitioner).

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS (AND CROSS-RESPONDENTS)

This reply brief, like the pertinent opening brief and responsive brief, will focus only on the issue raised by the government's ("EPA's") cross-petition for certiorari in No. 75-1705. That issue pertains to EPA's regulations constituting "new source" standards of performance for the inorganic chemicals industry, promulgated under Section 306 of the Federal Water Pollution Control Act, as amended ("the Act"), 33 U.S.C. § 1316.[1]

I.

EPA WOULD ABROGATE CONGRESS' PURPOSE IN PROVIDING SEPARATELY IN THE ACT FOR PROMULGATION OF NEW SOURCE STANDARDS BY REGULATION AND FOR ISSUANCE OF PERMITS FOR NEW SOURCES

For new sources, as well as for existing sources, Congress provided that affected plants should be subject to a permit

[1] Subsequent citations to the sections of the Act in this reply brief will omit references to the parallel United States Code citations.

system operated under the terms of Section 402. Permits issued under Section 402(a) by EPA, and permits issued under Section 402(b) by States with approved programs, must among other things reflect "applicable requirements . . . [of] sections . . . 306 [etc.]. . . ." (§§ 402(a)(1), 402(b)(1)(A).) Once a permit has issued, under Section 402(k) "[c]ompliance with a permit issued pursuant to this section [402] shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health."

Under EPA's interpretation of Sections 306 and 402, permit authorities must issue permits for new sources under Section 402 which apply by rote the new source standards promulgated under Section 306. (EPA's Br. at 6-7.) As EPA would have it, the new source standards are "ironclad" (*id.* at 13), and new plants are barred from making any showing in the permit proceedings to justify an exception from the generally applicable standards. This interpretation would abrogate Congress' purpose in providing separately in the Act for promulgation of new source standards by regulation and for issuance of permits for new sources.

Congress had good reason to make provisions for application of the permit system to new sources. New sources covered by a standard for one of the "classes" (subcategories) within an industry category will not inevitably take on the precise configuration contemplated by EPA when the standard for the given subcategory was written. The permit procedure provides a means of adjusting the standards for the exceptional case where the permit applicant demonstrates that his circumstances are different. As the Second Circuit observed in another but similar context:

> "Not all of the thousands of plants in operation can be expected to fit into prefabricated molds or templates. *By specifying a permit procedure, Congress implicitly conferred on the permit-grantor the privilege of construing the broader regulations in light of the specific type of plant applying for the permit.*"

(*Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 537 F.2d 642, 647 (2d Cir. 1976) (emphasis added).) [2]

In short, even for new sources, Congress intended that the permit authority do something other than merely identify the new source standard or standards applicable to the

[2] The Second Circuit was addressing the matter of "variance flexibility" for existing plants. See Pet. Reply Br. in No. 75-978, at 30 & n.27. Differences among plants within a subcategory are likely to be more prevalent for existing plants. Such differences will nonetheless arise for new plants as well, albeit with less frequency.

EPA says—

> "To impose such ironclad standards upon [existing plants] would be unfair. It would also contravene the congressional intent to achieve, by 1977 and 1983, effluent limitations that shall require application of 'the best practicable control technology currently available' and 'the best available technology economically achievable,' respectively."
>
> (EPA's Br. at 13.)

However, EPA then says: "No similar problem exists for new sources." (*Id.*) EPA makes this claim on the ground that "[a] new plant can be designed and equipped to utilize from its inception the best available pollution control technology." (*Id.* at 14.)

Taken in the abstract, petitioners agree with EPA's asserted ground: a new plant can be built from scratch to employ the best technology. The difficulty is that this circumstance does not support EPA's claim. A particular new plant's situation can be so different from the plants EPA contemplated in setting the standard, that even where the particular new plant employs the "best" technology it will not achieve the effluent results reflected in the standard. The differences might arise, for example, because of climate, raw material, product produced (where the subcategorization is based other than on products), grade of product (perhaps of high purity), process employed, the necessity to take special measures to control air emissions, or a combination of these various factors.

EPA says any such potential differences among new sources are taken into account by the Agency's having created subcategories. (EPA's Br. at 20.) EPA cites examples of subcategories created for rubber plants, petroleum refineries, and several other industrial categories. (*Id.*) In each instance, however, EPA's creation of subcategories within one basic industrial category reflects one or at most two of the factors set out in the preceding paragraph. The subcategories do not and cannot take into account all possible new-plant variations. Any standards which attempted to be all-encompassing would be much longer and more complex even than the present standards. They also would have to predict accurately and precisely the future changes in and development of nearly all segments of the nation's industry.

plant.[3] The "escape valve," which the court of appeals directed EPA to include in the new source standard, would allow the permit authority to adjust the requirements of the standard to take into account special circumstances at a particular plant. Such a "safety valve" would not, however, confer authority to deviate from the technological criterion of "best available demonstrated control technology" established by Section 306(a)(1).[4] Subject to the statutory technological criterion, the permit system established by Section 402 calls for the exercise of some judgment by the permit authority respecting a plant's individual circumstances.[5]

[3] Because of the way the Act's definitions are written, all new plants are not new sources. A "new source" is

> "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." (§ 306(a)(2).)

As a result of this definition, any and all "new sources" will be subject to an outstanding, applicable new source standard. There will be no new sources for which there are no standards. Thus, there could never be a standards "gap", and accordingly permit proceedings for new sources must have a purpose other than filling such a gap.

[4] For existing plants, the inherently flexible nature of guideline regulations would allow permit authorities to act within specified limits to set permit conditions appropriate for the particular plant involved. See Pet. Reply Br. in No. 75-978 at 30-31. The permit limitations would reflect "best practicable control technology currently available" for the 1977-step, and "best available technology economically achievable" for the 1983-step. (§§301 (b)(1)(A), 301(b)(2)(A).) Also for existing plants, but by way of contrast, Section 301(c) authorizes EPA to set permit limitations for a particular plant which are more permissive than the 1983-step criterion (reflected in the values specified in the range for each parameter in the 1983-step guideline regulations), if a requisite cost-based showing is made. See Pet. Reply Br. in No. 75-978 at 29-30.

[5] The adjustments contemplated under the "safety valve" would enable a new plant to be built. There are two other provisions of the Act which could lead to permit conditions different from, and more stringent than, the applicable new source standard. However, since a permit for a new plant must comply with the Section 306 "best available demonstrated control technology" criterion (§ 306(a)(1)), the more stringent conditions would, as EPA recognizes, amount in effect to a prohibition on construction. *(Continued on next page.)*

Like the Second Circuit, the Fourth Circuit in *du Pont II* recognized this congressional purpose when it directed EPA to "come forward with some limited escape mechanism for new sources." (App. 263.) Similarly, the Eighth Circuit has recognized that permit proceedings have some role in carrying out the statutory scheme for new sources. In *CPC International Inc.* v. *Train*, ——F.2d——, 9 E.R.C. 1301 (8th Cir. 1976) *("CPC II)*, the court held that in EPA's new source standard for corn wet mills the Agency need not provide for the statistically-expected "excursions" from the numerical values in the standard, because in the court's view the Federal- or State-issued discharge permit for a new source could contain provisions allowing for excursions even though the standard itself did not do so. (*Id.*, 9 E.R.C. at 1308.)

EPA says: "No other court of appeals that has considered the new sources standards has adopted this requirement [for a 'safety valve' procedure]." (EPA's Br. at 11 n.8.) This statement may be technically correct, because no court of appeals other than the Fourth Circuit has had the safety-valve issue presented directly to it. But both the Second Circuit in the *NRDC* case and the Eighth Circuit in the *CPC II* case concur in principle with the Fourth Circuit that a limited adjustment capability is essential to the reasonableness of EPA's general standards. These courts all would ascribe some purpose to permit proceedings for new sources, contrary to EPA's arguments.

Section 302 authorizes EPA to set for a particular plant "water quality related effluent limitations", and Section 510 authorizes States to set more stringent limitations. If the "best available demonstrated control technology" (§ 306(a)(1)) is deemed insufficient under either Sections 302 or 510, the plant at a minimum would face the task of developing a new and better technology before the plant is operated. Neither plant owners nor regulatory officials would welcome the risk inherent in relying upon development of technology better than "best available". As Deputy Administrator Quarles of EPA put the matter in a recent speech, these considerations "will in some cases preclude permission for construction of additional industrial facilities." Address by Deputy Administrator John R. Quarles, *To Grow Or Not To Grow—That Is Not The Question*, Fifth Annual International Pollution Engineering Congress, November 10, 1976, at 6.

II.
EXCEPT IN EXTRAORDINARY CASES, STATUTES PROVIDING FOR AGENCY RULES OF GENERAL APPLICABILITY ARE CONSTRUED TO INCLUDE USE OF "SAFETY VALVE" PROCEDURES TO PROVIDE RELIEF WHERE SPECIAL CIRCUMSTANCES ARE SHOWN

EPA argues that "[t]he cases the Fourth Circuit cited (A. 263) do not support its conclusion that variance provisions are mandatory." (EPA's Br. at 18 n.12.) EPA then seeks to explain away *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972); *Portland Cement Ass'n* v. *Ruckelshaus*, 158 U.S. App. D.C. 308, 332, 486 F.2d 375, 398-399 (1973), *cert. denied*, 417 U.S. 921 (1974); and *International Harvester Co.* v. *Ruckelshaus*, 155 U.S. App. D.C. 411, 437, 478 F.2d 615, 641 (1973). EPA argues that the *Allegheny-Ludlum* decision merely approves an agency's discretionary authority to adopt safety valve procedures for general rules (EPA's Br. at 18-19 n.12), and that the *Portland Cement* and *International Harvester* cases depended upon special facts.

EPA's distinctions are of questionable worth. More importantly, however, the government would ignore the fact that the *Allegheny-Ludlum* decision is but the most recent of a line of decisions in this Court and in the courts of appeals which have held that agencies have an obligation to look at the facts of "particular individualized cases" even where a general rule is involved. See *WAIT Radio* v. *Federal Communications Commission*, 135 U.S. App. D.C. 317, 321, 418 F.2d 1153, 1157 (1969). Due process considerations underlie a regulated party's right to present to an agency facts supporting an allegation that the objective of a general rule will not be served by applying the rule to the party's particular circumstances. As the court in *WAIT Radio* put the matter:

> "The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." (*Id.*, 418 F.2d at 1157.)

See also *Permian Basin Area Rate Cases*, 390 U.S. 747, 764, 771-772 (1968); *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33, 39-41 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 n.10, 204-205 (1956); and *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225 (1943).[6]

EPA would avoid the thrust of these decisions by arguing that Congress has affirmatively demonstrated an intent to have the new source standards apply by rote to all who fall within the ambit of the standards. (See EPA's Br. at 18.) This argument rests upon a simple and obvious error in reading the legislative history and deserves no credit. This is *not* the extraordinary case where the otherwise applicable "safety valve" doctrine, reflected in the *Allegheny-Ludlum* and *WAIT Radio* line of cases, is overridden by an express congressional determination that these particular general rules should always be applied whatever the circumstances of application might be.

III.
CONGRESS DID NOT PROVIDE THAT NEW SOURCE STANDARDS MUST ALWAYS BE APPLIED NOTWITHSTANDING THE EXISTENCE OF SPECIAL CIRCUMSTANCES

EPA argues that Congress demonstrated that it was unwilling to permit any deviation from the new source stan-

---

[6] As early as 1943 in the *National Broadcasting* decision, this Court recognized the necessity to provide a procedure for examining the facts of particular cases notwithstanding the existence of an applicable general rule:

> "The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an independent judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'" (*Id.*)

dards when it rejected a provision that would have allowed even a limited exemption for those sources which would have become subject to the new source standards because of modification. (EPA's Br. at 17-18.) This argument by EPA entirely misses the point of the cited congressional action.

Both the Senate- and House-passed bills did contain a provision which would have allowed the Administrator to exempt from the new source standards a source that became subject to the standards as a result of modification and which met a cost-based factual test. See, *e.g.*, H.R. 11896, 92d Cong., 2d Sess., § 306(b)(1)(C) (1972), 1 *Leg. Hist.* at 993. This provision was deleted by the Conference Committee. See S. Rep. No. 92-1236, 92d Cong., 2d Sess., at 128 (1972), 1 *Leg. Hist.* at 311. The reason for the deletion, however, was *not* that Congress decided to allow no exemptions whatsoever to the new source standards. Rather, Congress instead decided that modifications to existing plants should not be treated as new sources for purposes of the applicability of the new source standards:

> *"The Conferees deleted reference to the term 'modification' when applied to new sources.* The inclusion of this requirement in the Senate and the House bill was believed by the Conferees to be superfluous in light of the provisions which require existing sources (which might become subject to new source performance standards as a result of modification) to meet specific levels of effluent reduction by specific dates pursuant to section 301. To subject those sources to interim levels of control, simply because of a 'modification', would be redundant with the requirements of effluent limitations based on best practicable and best available technology. In any event, if an existing source modifies or changes its operation so as to alter the nature or amount of pollutants discharged, these would be a violation of the conditions of an existing permit and subject to review by the permitting agency. Further action by that source could be required. *The Conferees determined that the process established under section 306 for 'modifications' would be burdensome, duplicative and, therefore, it was deleted."*
> (*Id.*, 1 *Leg. Hist.* at 311-312 (emphasis added).)

And since the special cost-based exemption applied only to modifications, it too was deleted from the Act.[7]

The remaining portions of the legislative history cited by EPA restate the statutory requirement that new sources employ the "best available demonstrated control technology." (See EPA's Br. at 15-17.) These excerpts do not bear on EPA's argument that such technology is reflected by the values in the Agency's new source standards in every conceivable case. The legislative history shows no intent by Congress to adopt EPA's proposition.

IV.

THE PROVISIONS OF SECTION 402(k) EXPLICITLY PROVIDE FOR PERMIT CONDITIONS WHICH ARE DIFFERENT FROM EPA'S NEW SOURCE STANDARDS

Section 402(k) provides that, for purposes of the Act's enforcement provisions, compliance with a permit is deemed compliance with Section 306. EPA acknowledges as much. (EPA's Br. at 21.) However, EPA contests petitioners' resulting argument that permits may be issued which are different from and which supplant the new source standards. EPA says the conclusion is a *non sequitur* (EPA's Br. at 22), presumably on the ground that the Agency has found an alternative possible purpose for the provisions in Section 402(k). According to EPA, that purpose is to provide finality for permits, *i.e.*,

> "to insure that, once a point source has obtained a permit—which is deemed compliance with the Act—the Administrator's substantive changes in effluent

[7] Respecting the exemption provision, the Conference Report states simply that: "Section 306(b)(1)(C) of the Senate bill and the House amendment has been eliminated." (*Id.*, 1 *Leg. Hist.* at 311.) This comment should be read in light of the remarks pertaining to "the process established under Section 306 for 'modifications' ", quoted above, because that "process" included the exemption provision.

> limitations [*sic*—new source standards] will not place the permit holder in violation of the Act."
> *(id.)*

However, to accomplish the five-year-finality purpose which EPA suggests,[8] Congress did not have to write Section 402(k) as it did. A less encompassing provision would have sufficed. Indeed a different provision, Section 306(d), serves precisely the purpose EPA suggests, but provides for ten-year finality, double the five years EPA would offer, and for a broader class of plants. Section 306(d) provides that "*any* point source," not just a new source, "the construction of which is commenced" after enactment of the 1972 Amendments and which is built to meet "all applicable standards of performance" shall not be subject to "any more stringent standard of performance" for ten years beginning after completion of construction. (See Pet. Br. at 7 n.6.)

In sum, EPA would assign a purpose to Section 402(k) which is much narrower in scope than the language of the provision. EPA's suggested purpose is also served by another portion of the Act, Section 306(d); however, this provision, like Section 402(k), is broader in scope than EPA's assigned purpose. The effect of EPA's argument would be to attach a strained and artificially narrow construction to Section 402(k), and thereby to eliminate any opportunity for review of an individual new source's circumstances by permit authorities. Then EPA could have the "ironclad standards" it seeks for new sources. (See EPA's Br. at 13.)[9]

[8] Under Section 402(b)(1)(B), permits "are for fixed terms not exceeding five years . . . ."

[9] Petitioners do not argue that the National Environmental Policy Act ("NEPA"), as amended, 42 U.S.C. §§ 4321 *et seq.* provides authority to issue permits for new sources different from new source standards. *But cf.* EPA's Br. at 23 & n.13. Section 402 of the Act provides such authority. The NEPA inquiry which takes place for EPA-issued new source permits (see Pet. Br. at 8-9 & n.9) merely insures that the permit authority will fully explore the basis for any claim for divergence from the new source standards while at the same time assuring observance of the technological criterion of "best available demonstrated control technology." (§ 306(a)(1).)

This Court should reject EPA's arguments, and should instead construe the statute as Congress wrote it. Congress provided for the application of the permit system to new sources, and incorporated Section 402(k) to give weight and effect to the permit process. The permit system is essential to fair operation of the Act. It should not be crippled.

Conclusion

The court of appeals in *du Pont II* correctly ruled that EPA's new source standards must contain a "safety valve" procedure. The Court should affirm this portion of the *du Pont II* decision.

Respectfully submitted,

ROBERT C. BARNARD
DOUGLAS E. KLIEVER
CHARLES F. LETTOW
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorneys for Petitioners
(and Cross-Respondents)

OF COUNSEL:

CLEARY, GOTTLIEB, STEEN & HAMILTON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

NOVEMBER 26, 1976